Supreme Court, U.S.
FILED
MAY 10 1991
OFFICE OF THE CLERK

No. 90-1572

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ALABAMA POWER COMPANY,
Petitioner,

v.

GERALD L. TURNER, ADMINISTRATOR OF THE ESTATE OF KENNETH ALLEN TURNER, DECEASED,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Alabama

---

RESPONDENT'S BRIEF IN OPPOSITION

JERE L. BEASLEY
FRANK M. WILSON *
BEASLEY, WILSON, ALLEN, MENDELSOHN, JEMISON & JAMES, P.C.
207 Montgomery Street
P.O. Box 4160
Montgomery, Alabama 36103-4160
(205) 269-2343
Attorneys for Respondent

* Counsel of Record

May 10, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Does the due process clause of the fourteenth amendment prohibit Alabama from adopting a unique system for civil wrongful death actions which prohibits compensatory damages and imposes damages measured solely by the conduct of the wrongdoer?

2. Should this Court, as a matter of federal constitutional law, legislate to a state the system it must use to assess damages in wrongful death actions?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
A. Alabama Power's Conduct	2
B. The Jury Verdict	4
C. Review by the Alabama Courts	5
SUMMARY OF THE ARGUMENT	6
REASONS FOR DENYING THE WRIT	8
I. THE DECISION BELOW IS NOT INCONSISTENT WITH ANY DECISION OF THIS COURT AND THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THE DECISION OF ANY OTHER STATE SUPREME COURT OR FEDERAL COURT OF APPEALS	8
A. All Courts Which Have Considered the Constitutionality of the Alabama Wrongful Death Statute Have Upheld It	8
B. The Cases Cited by Petitioner Consider Damages Fundamentally Different from Those Allowed by the Alabama Wrongful Death Statute	12
II. THE ISSUE PRESENTED IS NOT OF SUFFICIENT NATIONAL IMPORTANCE TO WARRANT PLENARY REVIEW	17
A. Alabama's Wrongful Death Statute Imposes Unique Damages and Subjects Any Verdict to a Unique System of Post Verdict Review	17
B. This Court's Decision in *Pacific Mutual Life Ins. Co. v. Haslip* Provides Sufficient Direction to State Courts on the Issue of Punitive Damages	21

TABLE OF CONTENTS—Continued

Page

III. THE DECISION BELOW WAS FUNDAMENTALLY FAIR 23

IV. THIS COURT SHOULD NOT, AS A MATTER OF FEDERAL CONSTITUTIONAL LAW, LEGISLATE TO A STATE THE SYSTEM IT MUST USE TO ASSESS DAMAGES IN WRONGFUL DEATH ACTIONS 26

CONCLUSION 28

TABLE OF AUTHORITIES

CASES Page

Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986), *after remand*, 505 So.2d 1050 (Ala. 1987) 20, 21
Alabama Electric Coop. v. Partridge, 215 So.2d 580 (Ala. 1968) 13
Alabama Power Co. v. Cantrell, 507 So.2d 1295 (Ala. 1986), *appeal dismissed*, 486 U.S. 1028 (1988) 12, 23, 24
Alabama Power Co. v. Capps, 519 So.2d 1328 (Ala. 1988), *appeal dismissed*, 486 U.S. 1002 (1988) .. 12, 23, 24
Alabama Power Co. v. Courtney, 539 So.2d 170 (Ala. 1989) 23
Alabama Power Co. v. Dunlay, 240 Ala. 568, 200 So. 617 (1941) 13
Alabama Power Co. v. Kirkpatrick, 268 Ala. 338, 105 So.2d 855 (1957) 24
Alabama Power Co. v. Marine Builders, Inc., 475 So.2d 54 (Ala. 1984) 23
Alabama Power Co. v. Robinson, 404 So.2d 22 (Ala. 1982) 23
Alabama Power Co. v. Scholz, 283 Ala. 259, 215 So.2d 447 (1968) 24
Alabama Power Company v. Sessions, 519 So.2d 1328 (Ala. 1988) 23
Alabama Power Co. v. Smith, 273 Ala. 509, 142 So.2d 228 (1962) 24
Alabama Power Company v. Stogner, 208 Ala. 666, 95 So. 151 (Ala. 1922) 23
Alabama Power Co. v. Talmadge, 207 Ala. 86, 93 So. 578, *writ of error dismissed*, 259 U.S. 575 (1922) 11, 24
Alabama Power Co. v. White, 377 So.2d 930 (Ala. 1979) 24
Bagley v. Grime, 28 Ala. 668, 220 So.2d 876 (1969) 15
Banker's Life and Casualty Co. v. Crenshaw, 486 U.S. 71 (1988) 21
Beck v. Carolina Power & Light Co., 291 S.E.2d 897 (N.C.App.), *aff'd*, 297 S.E.2d 397 (1982) 27

TABLE OF AUTHORITIES—Continued

Page

Behrens v. Raleigh Hills Hospital Inc., 675 P.2d 1179 (Utah 1983) 27
Bell v. Riley Bus Lines, 257 Ala. 120, 57 So.2d 612 (1952) 16
Berenger v. Frink, 314 N.W.2d 388 (Iowa 1982) 27
Black Belt Wood Co. v. Sessions, 514 So.2d 1249 (Ala. 1986) 4, 15
Bonsignore v. City of New York, 521 F.Supp. 394 (S.D. N.Y. 1981) 18
Brown v. Maxey, 369 N.W.2d 677 (Wis. 1985) 18
Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257 (1989) 21
Budd Wolf Chevrolet, Inc. v. Robertson, 508 N.E.2d 567 (Ind. App. 2 Dist. 1987) 18
Burford v. United States, 642 F.Supp. 635 (N.D. Ala. 1986) 16
Burlington Northern v. Whitt, 575 So.2d 1011 (Ala. 1990), *cert. denied*, 59 U.S.L.W. 3672 (April 1, 1991) 11, 12, 22
Campbell v. Alabama Power Co., 378 So.2d 718 (Ala. 1979) 24
Campbell v. Davis, 274 Ala. 555, 150 So.2d 187 (1962) 15
Central Alabama Electric Coop. v. Tapley, 546 So.2d 371 (Ala. 1989) 6, 11, 13, 20
Church of Scientology of California v. Wollersheim, —— U.S. ——, 111 S.Ct. 1299, 113 L.Ed.2d 234 (1991) 22
Clardy v. Sanders, 551 So.2d 1057 (Ala. 1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 376, 107 L.Ed.2d 362 (1989) 11, 12, 14, 15
Clayton Brokerage v. Gordon, —— U.S. ——, 111 S.Ct. 1298, 113 L.Ed.2d 233 (1991) 22
Curry v. Baker, 479 U.S. 1301 (Powell, Circuit Justice 1986) 21
Day v. Woodworth, 54 U.S. 363, 13 How. 363 (1852) 12
Denny v. Seaboard Lacquer, Inc., 487 F.2d 485 (4th Cir. 1973) 16, 17

TABLE OF AUTHORITIES—Continued

Page

Eichenseer v. Reserve Life Insurance Co., 894 F.2d 1414 (5th Cir. 1990), *cert. granted and remanded*, —— U.S. ——, 111 S.Ct. 1298, 113 L.Ed.2d 233 (1991) 18, 22
Eisert v. Greenberg Roofing & Sheet Metal Co., 314 N.W.2d 226 (Minn. 1982) 27
Employers Ins. Co. of Alabama v. Brock, 233 Ala. 551, 172 So. 671 (1937) 15-16
Esdale v. Baxter, 219 Ala. 256, 122 So. 12 (1929) .. 10
Esmond v. Youkers, 224 A.2d 793 (Pa. 1967) 16
Ex parte Harris, 277 Ala. 421, 171 So.2d 237 (1965) 24
Ex parte Newell, Inc., 569 So.2d 725 (Ala. 1990) .. 23
Ex parte Tanksley, 418 So.2d 94 (Ala. 1982) 23
First Interstate Development Corporation v. Ablanedo, 511 So.2d 536 (Fla. 1987) 18
Florida Railroad and Navigation Co. v. Webster, 25 Fla. 394, 5 So. 714 (1889) 13
Gavica v. Hanson, 608 P.2d 861 (Idaho 1980) 27
General American Life Insurance Company v. Simmons, 562 So.2d 140 (Ala. 1989), *cert. denied*, —— U.S. ——, 111 S.Ct. 1306, 113 L.Ed.2d 240 (1991) 22
Geohagan v. General Motors Corporation, 279 So.2d 436 (Ala. 1983) 14
Goetz v. Ambs, 27 Mo. 28 (1858) 13
Green Oil Co. v. Hornsby, 539 So.2d 218 (Ala. 1989) 5, 9, 20
Gross v. Delaware L. and W. R. Co., 50 NJL 317, 13 A. 233 (1888) 13
Hammond v. City of Gadsden, 493 So.2d 1374 (Ala. 1986) 5, 9, 21
Hospital Authority of Gwinnett, Georgia v. Jones, —— U.S. ——, 111 S.Ct. 1298, 113 L.Ed.2d 234 (1991) 22
Howard v. Davis, 209 Ala. 113, 95 So. 354 (1923) .. 10
In re Paris Air Crash, 427 F.Supp. 701 (C.D. Cal. 1977) 27

TABLE OF AUTHORITIES—Continued

Page

In re Paris Air Crash, 622 F.2d 1315 (9th Cir. 1980) 27
Industrial Chemical and Fiberglass Corp. v. Chandler, 547 So.2d 812 (Ala. 1989) 1, 10, 11, 15
International Society of Krishna v. George, —— U.S. ——, 111 S.Ct. 1299, 113 L.Ed.2d 235 (1991) 22
Jaffree v. Board of School Commissioners of Mobile County, 459 U.S. 13, 14 (1983) 8
Killough v. Jahandarfard, [Ms. 89-925 Feb. 15, 1991], —— So.2d —— (1991) 11
King v. Henkie, 80 Ala. 505 (1888) 13
Lewis v. Sears, Roebuck & Co., 512 So.2d 712 (Ala. 1987) 15
Loucks v. Standard Oil Co. of New York, 120 N.E. 198 (Ct. of App. N.Y. 1918) 14
Louis Pizitz Dry Goods Co. v. Yeldell, 274 U.S. 112 (1927) ..... *passim*
Louisville and N.R. Co. v. Bailey, 245 Ala. 178, 16 So.2d 167 (1943) 15
Macchiaroli v. Howell, 294 Mass. 144, 200 N.E. 905 (1936) 12
Marbury Lumber Co. v. Jones, 206 Ala. 669, 91 So. 623 (1921) 15
Massachusetts Mutual Life Insurance Company v. Collins, —— U.S. ——, 111 S.Ct. 1306, 113 L.Ed.2d 240 (1991) 22
Mattison v. Kirk, 497 So.2d 120 (Ala. 1986) 23
Merrell v. Alabama Power Co., 382 So.2d 494 (Ala. 1980) 23-24
Mosley v. Alabama Power Co., 246 Ala. 416, 21 So.2d 305 (1945) 24
Murray v. Alabama Power Co., 413 So.2d 1109 (Ala. 1982) 23
Olympia Spa v. Johnson, 547 So.2d 80 (Ala. 1989) 11
Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. ——, 111 S.Ct. 1032, 112 L.Ed.2d 1 (1991) ..... *passim*
Pacileo v. Walker, 446 U.S. 1307 (1980) 8

TABLE OF AUTHORITIES—Continued

	Page
Peevy v. Alabama Power Co., 393 So.2d 971 (Ala. 1981)	23
Pittsburg, Cincinnati and St. Louis Railway Co. v. Lyon, 123 Pa. 140, 16 A. 607 (1899)	13
Platomic Electric Power Co. v. Smith, 558 A.2d 768 (Md.App. 1989), *cert. denied*, 564 A.2d 407 (Md. 1989)	27-28
Portec, Inc. v. The Post Office, —— U.S. ——, 111 S.Ct. 1299, 113 L.Ed.2d 235 (1991)	22
Putnam v. Savage, 244 Mass. 83, 138 N.E. 808 (1923)	12, 14
Ragsdale v. Altec Industries, 456 So.2d 54 (Ala. 1984)	23
Re Air Crash Disaster Near Chicago, 507 F.Supp. 21 (N.D. Ill. 1980), *aff'd*, 644 F.2d 633 (7th Cir. 1981)	27
Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74 (1955)	17
Richmond and Danville R.R. v. Freeman, 97 Ala. 289, 11 So. 800 (1892)	7, 11
Rivers v. Kairis, 442 N.E.2d 494 (Ohio 1982)	27
Root v. McDonald, 260 Mass. 344, 157 N.E. 684 (1927)	12
Rubeck v. Huffman, 374 N.E.2d 411 (Ohio 1978)	27
Savannah and Memphis R.R. v. Shearer, 58 Ala. 672 (1877)	9
Sliman v. Aluminum Co. of America, 731 P.2d 1267 (Idaho 1986)	18
Smith v. Wade, 461 U.S. 30 (1983)	14
Southern Ry. v. Bush, 122 Ala. 470 (Ala. 1898)	9, 11
State v. Sanchez, 579 P.2d 568 (Ariz. 1978)	16
Sullivan v. Alabama Power Co., 246 Ala. 262, 20 So.2d 224 (1945)	24
Thomas v. Eads, 400 N.E.2d 778 (Ind. App. 1980)	27
Traveler's Indemnity Co. v. Armstrong, 442 N.E.2d 349 (Ind. 1988)	18
Truelove v. Wilson, 285 S.E.2d 556 (Ga. App. 1981)	27

TABLE OF AUTHORITIES—Continued

	Page
Turner v. Alabama Power, 575 So.2d 551 (Ala. 1991)	6, 12
United States Cast Iron Pipe and Foundry Co. v. Sullivan, 3 F.2d 794, (5th Cir. 1925), *cert. denied*, 268 U.S. 696 (1925)	6, 11, 17
United States v. Johnston, 268 U.S. 220 (1925)	24
Wardrobe v. California Stage Co., 7 Cal. 118, 120 (1857)	12
Watson v. Adams, 187 Ala. 490, 65 So. 528 (1914)	10
Worley v. Cincinnati H. and D. R. Co., 12 Ohio Dec Reprint 247, 1 *Handy* 481 (1853)	13
Yamaha v. Thornton, [Ms. 89-1618, May 3, 1991] —— So.2d —— (Ala. 1991)	11

STATUTES

Alabama Code § 2641 (1876)	8
Alabama Code Title 7 § 123 (1940)	8
Alabama Code § 6-5-410 (1975)	1, 8
Alabama Code § 6-11-20 (Supp. 1990)	15
Alabama Code § 6-11-29 (Supp. 1990)	15
Alabama Code § 27 (1896)	8
Alabama Code § 1940 (1852)	8
Alabama Code § 2589 (1887)	8
Alabama Code § 5696 (1923)	8
Fla. Stat. § 768.19 (1984)	26
Idaho Code § 5-311 (1982)	26
Ill. Rev. Stat. ch. 10 § 2 (1979)	27
Ind. Code § 34-1-1-2 (1975)	26
Iowa Code § 613.15 (1970)	26
Kan. Stat. Ann. § 60-1904	26
Mass. Gen. Laws Ann. Ch. 299, § 2 (West 1990)	18
Minn. Stat. § 573.02 (1982)	26
Mont. Code Ann. § 93-2810 (1990)	26

OTHER AUTHORITIES

Supreme Court Rule 10.1	8
Black's Law Dictionary 390 (6th ed. 1990)	13
Gamble, *Ala. Law of Damages*, § 37-9 (2d.ed. 1988)	18

TABLE OF AUTHORITIES—Continued

Page

Speiser, *Recovery for Wrongful Death* 2d. §§ 1:9, 3:3 (1975) 18, 26

Zabin, *The New Wrongful Death Act in Massachusetts Steps Into the Twentieth Century*, 58 Mass. L.Q. 345 (1973) 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1572

ALABAMA POWER COMPANY,
Petitioner,

v.

GERALD L. TURNER, ADMINISTRATOR OF THE ESTATE OF KENNETH ALLEN TURNER, DECEASED,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Alabama

---

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner, Alabama Power Company ("Alabama Power"), seeks review of a judgment imposed by the courts of Alabama under Alabama's wrongful death statute. *Alabama Code*, § 6-5-410 (1975). For more than 100 years Alabama has prohibited any compensatory damages for wrongful death and allowed the family of a person killed by the wrongful conduct of another to recover only damages based solely on the wrongdoer's conduct. Although these damages are labeled "punitive" the statute is remedial and not penal. *Louis Pizitiz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927); *Industrial and Chemical Fiberglass Corp. v. Chandler*, 547 So.2d 812 (Ala. 1989). The purpose of the statute is to "strike

at the evil of the *negligent* destruction of human life" and "to attempt to preserve human life by making homicide expensive." 274 U.S. at 116. (emphasis supplied).

The Alabama system is unique—both in the damages it allows and in its system of post-judgment review. The latter provides "meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages." *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. ——, 111 S.Ct. 1032, 1045 (1991).

Alabama Power asserts a substantive due process challenge to the Alabama system because it allows the imposition of "punitive" damages for negligent conduct which causes death.[1] Alabama Power did not present its argument that due process requires "an express statutory or common law limit establishing in advance the maximum punishment that may be imposed" to the courts below. Pet. 4a-10a.

A. Alabama Power's Conduct

Alabama Power omits any description of its conduct for which the Alabama courts imposed this judgment other than to characterize it as "simple negligence." The evidence of misconduct—found by the jury, trial court and Supreme Court of Alabama to fully justify the amount of the damage award—shows something quite different.

Kenneth Turner, a long-haul truck driver, delivered a load of meat to the Hormel plant in Montgomery, Alabama. When he attempted to close the rear door of his trailer, the door struck a guy wire owned and maintained by Alabama Power.[2] Unknown to Kenneth Turner and

---

[1] The Supreme Court of Alabama summarized Alabama Power's due process argument in its opinion. Petition for Writ of Certiorari (hereinafter "Pet.") at 4a.

[2] A guy wire is attached at the top of a utility pole and runs to an anchor on the ground to support the tension of power lines running in the opposite direction.

others who regularly parked along that street,[3] the upper portion of the guy wire was only 2½ inches from an energized conductor charged with 7200 volts of electricity. When the trailer door struck it, the guy wire made contact with the energized conductor and Kenneth Turner was electrocuted.

Alabama Power admitted that the clearance between that guy wire and the nearest energized conductor grossly violated all applicable safety standards.[4] Pet. at 28a. Alabama Power admitted these violations created an extremely dangerous condition likely to cause death or serious injury. Pet. at 28a.

Alabama Power has approximately 1,000,000 poles and more than 300,000 guy wires in its system. Between 3000 and 6000 guy wires are located at installations similar in configuration to the location where Kenneth Turner was killed.[5] Alabama Power admitted it has no system to identify such potentially dangerous locations, and no routine inspection program for its wires and equipment. Pet. at 29a.

The dangerous condition at this location resulted from a major construction project in the area some fifteen months before Kenneth Turner's death. Pet. at 28a. Alabama Power admitted that when the plans for construction were drawn the design engineer "eyeballed" the forces to be exerted on this particular pole and performed no calculations at all.[6] Pet. at 29a. The engineer's su-

---

[3] This guy wire was located along a heavily traveled street. An apartment complex which housed many families was located only a few blocks away.

[4] The National Electric Safety Code required six inches clearance. Alabama Power's own standards required 12 inches clearance.

[5] At this location the guy wire ran between two energized conductors.

[6] Alabama Power also admitted that the design engineer should have calculated the forces exerted on the pole and that his calcula-

pervisor approved the design even though no computations had been done.

By the time the project was completed the design engineer had been transferred to another position and was performing the duties of both jobs. His inspection of the project was cursory at best. He measured no clearances. He either failed to notice the dangerous condition or, if he noticed it, took no action to correct it.

Alabama Power has no routine safety inspection program for its lines and equipment. However, employees walked directly past this location to read meters each month during the fifteen months prior to Kenneth Turner's death. In addition, Alabama Power employees made sixteen service calls within two blocks of this location. The dangerous condition was either not observed or if observed was not corrected. Pet. at 28a-29a.

B. The Jury Verdict

Alabama Power contended that Kenneth Turner was himself negligent in striking the guy wire with the door of his truck. Consequently the trial court instructed the jury as to both Plaintiff's negligence claim and his wantonness claim.[7]

The trial court provided a verdict form for the jury:

1. We, the jury, find for the Plaintiff based on (check one):

   negligence X

   wantonness ———

---

tions should have been reviewed by his superiors before the design was given final approval.

[7] In Alabama contributory negligence of the deceased is a complete defense to a wrongful death claim of negligence but not to a claim of wanton conduct. *Black Belt Wood Co. v. Sessions*, 514 So.2d 1249, 1258 (Ala. 1986).

The trial court submitted no special interrogatories to the jury. The jury was instructed that *either* of Plaintiff's theories would support a verdict under the Alabama wrongful death statute. Since the jury apparently rejected Alabama Power's contributory negligence defense, there was no reason for the jury to even consider the wantonness claim. The jury was required, however, to consider defendant's culpability in assessing the amount of damages. Alabama Power is simply incorrect in its assertion that the jury verdict "establishes that the basis of the jury's award was simple negligence and not wantonness." Pet. at 4. To the contrary, the jury verdict of $5,000,000 establishes that the jury found substantial culpability on the part of Alabama Power.

C. Review By The Alabama Courts

On Alabama Power's motion for new trial and request for remittitur, the trial court carefully reviewed the evidence which supported the jury verdict and applied the standards established in *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), and *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989).[8] The trial court held an evidentiary hearing and gave Alabama Power opportunity to offer evidence to suggest that the jury verdict was more severe than warranted by its misconduct or that the award would adversely affect its continued economic viability. Alabama Power offered no evidence whatsoever as to the financial impact the jury's award could or would have on it.

The trial court issued a detailed order that included specific findings: (1) that the jury award of $5,000,000 was not the result of any bias, passion or prejudice, (2)

---

[8] Standards characterized by this Court as imposing "a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages." *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. ——, 111 Sup.Ct. 1032, 1045, 113 L.Ed.2d 1, 14 (1991).

that the award was justified by the evidence presented, and (3) that the evidence indicated conduct by Alabama Power which justified imposition of damages in that amount. Pet. at 30a.

On appeal the Supreme Court of Alabama conducted a *de novo* review of the jury verdict and the trial court's post judgment order. The Supreme Court found no evidence of bias, passion, or prejudice and quoted with approval the trial court's post judgment order. Pet. 11a-15a. The Court also compared the award to awards in similar cases and, as a result, granted Alabama Power a new trial unless Turner accepted a $1,500,000 reduction in the jury verdict. Turner accepted the remittitur resulting in a judgment of $3,500,000.

SUMMARY OF THE ARGUMENT

Alabama Power asserts no basis for plenary review by this Court. The decision below is not inconsistent with any prior controlling opinion of this Court or in conflict with any decision of another state supreme court or federal court of appeals. This Court rejected substantially the same constitutional challenge made by Alabama Power more than sixty years ago. *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927). The United States Court of Appeals for the Fifth Circuit also rejected a similar constitutional challenge to the statute. *United States Cast Iron Pipe and Foundry Co. v. Sullivan*, 3 F.2d 794 (5th Cir. 1925), *cert. denied*, 268 U.S. 696 (1925). The Alabama Supreme Court has rejected constitutional challenges, both soon after the statute was enacted and recently, including the decision below. *Richmond and Danville R.R. v. Freeman*, 97 Ala. 289 (1892); *Central Alabama Electric Coop. v. Tapley*, 546 So.2d 371 (Ala. 1989); *Turner v. Alabama Power*, 575 So.2d 551 (Ala. 1991), Pet. 3a-10a.

None of the cases cited by Alabama Power requiring wanton, malicious or intentional conduct to justify puni-

tive damages are inconsistent with the decision below because in those cases punitive damages were awarded *in addition to* full compensation to the victim. The Alabama wrongful death statute prohibits any compensatory damages. The Alabama Supreme Court has recognized that the damages allowed by the statute are not "punitive" in the classic sense. Many characteristics of the statute confirm this interpretation. The courts of other states have consistently viewed damages recoverable under the Alabama wrongful death statute as different from classic punitive damages.

This Court should decline plenary review because the Alabama wrongful death statute is unique. It imposes unique damages and subjects any verdict to a unique system of post-judgment review. Consequently, this case presents no issue applicable outside the State of Alabama.

In a recent decision, *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. ——, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), this Court considered at length the requirements of due process to assess punitive damages. Emphasizing the historic tradition of punitive damages, this Court recognized that the instructions to the jury and the Alabama system of post-judgment review impose a sufficiently definite and meaningful restraint on the discretion of Alabama fact finders in awarding punitive damages. There is no need for further review of this issue.

The decision below was fundamentally fair. Alabama Power had sufficient notice that its conduct could subject it to a substantial judgment. The Alabama procedures insured that the award was not grossly out of proportion to the severity of the offense. In fact, the court below reduced the jury award by $1,500,000.00.

Finally, this Court should not, as a matter of federal constitutional law, legislate to a state the system it must use to assess damages in wrongful death actions. Recovery for wrongful death is statutory in each of the fifty

states. The provisions of these statutes vary widely as to the measure and elements of recoverable damages. These statutory schemes represent a classic exercise of police power by the states. This Court should leave to the states the policy decision of what type damages to allow under such a statutory scheme.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS NOT INCONSISTENT WITH ANY DECISION OF THIS COURT AND THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THE DECISION OF ANY OTHER STATE SUPREME COURT OR FEDERAL COURT OF APPEALS.

Alabama Power's due process challenge to the Alabama wrongful death statute does not meet the requirements of Supreme Court Rule 10.1. The Supreme Court of Alabama's decision in this case is not inconsistent with any prior controlling opinion of this Court. There is no conflict between the decision below and any decision of another state supreme court or federal court of appeals. *See, Jaffree v. Board of School Commissioners of Mobile County*, 459 U.S. 13, 14 (1983); *Pacileo v. Walker*, 446 U.S. 1307 (1980).

A. All Courts Which Have Considered the Constitutionality of the Alabama Wrongful Death Statute Have Upheld It.

The Alabama wrongful death statute has a long history. The statute was first passed in 1852 and has been reenacted several times without substantial change.[9] The judicial interpretation that damages are to be assessed

---

[9] *Alabama Code* § 1940 (1852); *Alabama Code* § 2641 (1876); *Alabama Code* § 2589 (1887); *Alabama Code* § 27 (1896); *Alabama Code* § 5696 (1923); *Alabama Code* Title 7, § 123 (1940); *Alabama Code* § 6-5-410 (1975).

based solely on the conduct of the defendant came more than 100 years ago.[10]

More than sixty years ago this Court unanimously rejected a constitutional challenge to the statute substantially the same as now asserted by Alabama Power. *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927). In *Yeldell* the family of a department store customer killed in an elevator brought a claim under the Alabama statute based only on negligence. In rejecting a due process challenge to the statute,[11] this Court stated:

> The legislation now challenged has been on the statute books of Alabama in essentially its present form since 1872. The liability imposed is for tortious acts resulting in death, but the damages, which may be punitive even though the act complained of involved no element of recklessness, malice or wilfulness, may be assessed against the employer who, as here, is personally without fault. The Supreme Court of Alabama has repeatedly ruled that the statute is aimed at the prevention of death by wrongful act or omission. "The statute is remedial, and not penal, and was designed as well to give a right of action where none existed before, as to 'prevent homicides,' and the action given is purely civil in its nature for the redress of private, and not public wrongs."

274 U.S. at 114. (Citations omitted) (Quoting *Southern Ry. v. Bush*, 122 Ala. 470, 489 (1898).

Alabama Power relegates its discussion of this controlling precedent to a footnote. Pet. at 28. Alabama Power seeks to distinguish *Yeldell* as considering only the vicarious liability of the employer for the tortfeasor's negligence. This argument is curious at best. If these

---

[10] *Savannah and Memphis R.R. v. Shearer*, 58 Ala. 672 (1877).

[11] It should be noted that the decision in *Yeldell* came years before Alabama established the unique substantive and procedural safeguards of *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986) and *Green Oil v. Hornsby*, 539 So.2d 218 (Ala. 1989).

damages can constitutionally be levied against an admittedly innocent employer, *a fortiorari*, the damages can be assessed against the negligent employee. In addition, virtually identical arguments concerning "standardless discretion" of the jury to impose "an unlimited penalty" were made by the petitioner in that case.[12]

Moreover, this Court plainly stated:

> As interpreted by the state court, the aim of the present statute is to strike at the evil of the *negligent* destruction of human life by imposing liability, regardless of fault, upon those who are in some substantial measure in a position to prevent it. We cannot say that it is beyond the power of a legislature, in effecting such a change in the common law rules, to attempt to preserve human life by making homicide expensive.

274 U.S. at 116. (emphasis supplied).

Contrary to Alabama Power's assertion [13] the Supreme Court of Alabama's interpretation of the wrongful death statute has not changed since *Yeldell*. The assumption on which this Court's decision was based—that Alabama's wrongful death statute was "remedial, and not penal"—is still valid. As recently as 1989 the Supreme Court of Alabama, citing this Court's decision in *Yeldell*, reaffirmed the remedial nature of the statute and its purpose —"the protection of human life." [14] *Industrial Chemical and Fiberglass Corp. v. Chandler*, 547 So.2d 812, 818 (Ala. 1989).

---

[12] *Brief of Petitioner*, pp. 8-10, 29-30, 32, *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927).

[13] Pet. at 28.

[14] The Alabama Court has described the statute as remedial on numerous other occasions. *Esdale v. Baxter*, 219 Ala. 256, 122 So. 12 (1929); *Howard v. Davis*, 209 Ala. 113, 95 So. 354 (1923); *Watson v. Adams*, 187 Ala. 490, 65 So. 528 (1914).

This Court was not the first to uphold the constitutionality of the Alabama statute. In *Richmond and Danville R.R. v. Freeman*, 97 Ala. 289 (1892), the Supreme Court of Alabama upheld the statute against a constitutional challenge: "it is as clearly within legislative competency, of course, to punish *negligence* as it is to punish wantonness, willfulness or intentional wrongdoing." 97 Ala. at 295. (emphasis supplied). *See also, Southern Ry. v. Bush*, 122 Ala. 470, 489 (Ala. 1898); *Alabama Power Co. v. Talmadge*, 207 Ala. 86, 93 So. 548, *cert. denied*, 259 U.S. 575 (1922).

In *United States Cast Iron Pipe and Foundry Company v. Sullivan*, 3 F.2d 794 (5th Cir. 1925), *cert. denied*, 268 U.S. 696 (1925), the United States Court of Appeals for the Fifth Circuit rejected the argument that the recovery of "punitive" damages for negligence alone violated the due process clause of the fourteenth amendment. "It is clearly within legislative competency to give a civil right of action for the *negligent* or wrongful killing of a human being, and to make the wrongdoer liable for punitive or exemplary damages." 3 F.2d at 796. (emphasis supplied).

The Supreme Court of Alabama has considered constitutional challenges to the wrongful death statute in a number of other cases. *Yamaha v. Thornton*, [Ms. 89-1618, May 3, 1991], —— So.2d —— (Ala. 1991); *Killough v. Jahandarfard*, [Ms. 89-925, Feb. 15, 1991], —— So.2d —— (Ala. 1991); *Burlington Northern v. Whitt*, 575 So.2d 1011 (Ala. 1990), *cert. denied*, 59 U.S.L.W. 3672 (April 1, 1991); *Clardy v. Sanders*, 551 So.2d 1057 (Ala. 1989), *cert. denied*, 110 Sup.Ct. 376 (1989); *Central Alabama Electric Coop. v. Tapley*, 546 So.2d 371 (Ala. 1989); *Olympia Spa v. Johnson*, 547 So.2d 80 (Ala. 1989); *Industrial Chemical and Fiberglass Corp. v. Chandler*, 547 So.2d 812 (Ala. 1988). On each occasion the Alabama Court has upheld the constitutionality of the statute. It rejected petitioner's challenges in

this case as well. *Turner v. Alabama Power*, 575 So.2d 551 (Ala. 1991), Pet. 3a-10a.

This Court has refused to reconsider its decision in *Yeldell* on at least four occasions. *Burlington Northern v. Whitt*, 575 So.2d 1011 (Ala. 1990), *cert. denied*, 59 U.S.L.W. 3672 (April 1, 1991); *Clardy v. Sanders*, 551 So.2d 1057 (Ala. 1989), *cert. denied*, 110 Sup.Ct. 376 (1989); *Alabama Power Co. v. Capps*, 519 So.2d 1328 (Ala. 1988), *appeal dismissed*, 486 U.S. 1002 (1988); *Alabama Power Co. v. Cantrell*, 507 So.2d 1295 (Ala. 1986), *appeal dismissed*, 486 U.S. 1028 (1988). It should refuse again in this case.

Every court that has considered the Alabama wrongful death statute has upheld its constitutionality.[15] Alabama Power's petition for writ of certiorari should be denied.

B. The Cases Cited by Petitioner Consider Damages Fundamentally Different from Those Allowed by the Alabama Wrongful Death Statute.

Alabama Power bases its constitutional challenge on a flawed premise: that the damages recoverable for wrongful death in Alabama are equivalent to punitive damages recoverable under other forms of action. Each of the cases it cites involved punitive damages imposed *in addition to* full and adequate compensation of the victim for his injuries.[16] Alabama law is consistent in requiring

---

[15] Alabama Power also fails to cite any case where a constitutional challenge to the Massachusetts statute was successful even though that statute assessed damages based solely on the conduct of the wrongdoer until a 1974 amendment. *See, Macchiaroli v. Howell*, 294 Mass. 144, 200 N.E. 905 (1936); *Root v. McDonald*, 260 Mass. 344, 157 N.E. 684 (1927); *Putnam v. Savage*, 244 Mass. 83, 138 N.E. 808 (1923).

[16] *Day v. Woodworth*, 54 U.S. 363, 13 How. 363 (1852) ("courts permit juries to *add to the measured compensation* of the plaintiff"); *Wardrobe v. California Stage Co.*, 7 Cal. 118, 120 (1857) (negligence did not give the jury power to "go beyond" compensation for "actual damages sustained" and award "punitive dam-

wanton or malicious conduct for the imposition of punitive damages *in addition to* full compensation.[17] This body of law is consistent with the traditional definition of punitive damages:

> Exemplary damages are damages on an increased scale, awarded to the plaintiff over and above what will barely compensate him.

Compensatory damages on the other hand:

> Are such as will compensate the injured party for the injuries sustained, and nothing more.

Black's Law Dictionary 390 (6th ed. 1990).

The damages allowed by the Alabama wrongful death statute are different. The Alabama statute prohibits the family of the deceased from recovering any compensatory damages. Alabama refuses to allow any attempt to place a monetary value on human life. "One may be adequately compensated for his injuries but the value of human life is without measure."[18] *Central Alabama Electric Coop. v. Tapley*, 546 So.2d 371, 375 (Ala. 1989).

---

ages"); *Florida Railway and Navigation Co. v. Webster*, 25 Fla. 394, 5 So. 714 (1889) ("only compensatory damages will be allowed, if there is no positive thought of the nature of recklessness"); *Goetz v. Ambs*, 27 Mo. 28 (1858) ("if the injury is not *intentional, but* results simply from a want of proper care, nothing more should be recovered *than will compensate* for the actual damage.") (emphasis supplied); *Pittsburg, Cincinnati and St. Louis Railway Co. v. Lyon*, 123 Pa. 140, 150, 16 A. 607 (1899) (torts committed through "mistake, ignorance, or mere negligence, the ordinary rule is *mere compensation*") (emphasis supplied). Every case which appears in Appendix G to the Petition involves such classic punitive damages.

[17] *Alabama Electric Coop. v. Partridge*, 215 So.2d 580 (Ala. 1968); *Alabama Power Co. v. Dunlay*, 240 Ala. 568, 200 So. 617 (1941).

[18] Many courts have cited this principle as the reason why no action for wrongful death existed at common law. *King v. Henkie*, 80 Ala. 505 (1888); *Gross v. Delaware L. and W. R. Co.*, 50 NJL 317, 13 A. 233 (1888); *Worley v. Cincinnati H. and D. R. Co.*, 12 Ohio Dec Reprint 247, 1 *Handy* 481 (1853).

In *Smith v. Wade*, 461 U.S. 30 (1983), then Justice Rehnquist criticized punitive damages in civil rights actions as "a windfall to plaintiffs, who are entitled to receive full compensation for their injuries—but no more." Alabama adheres to the principle that there can be no "full compensation" for the wrongful taking of a human life. Not even Alabama Power could suggest that Gerald Turner will receive a "windfall" as a result of the death of his son. Unlike the potential civil rights plaintiff Chief Justice Rehnquist considered, Mr. Turner will receive no compensation other than this verdict.

The Supreme Court of Alabama has often recognized that the damages recoverable under the wrongful death statute are not classic punitive damages: [19]

> The sense in which damages recoverable under the Alabama Homicide Act are deemed punitive is *sui generis* and the term is not used in the identical sense when applied to actions involving wanton misconduct or intentional injury.

Geohagan v. General Motors Corporation, 291 Ala. 167 (Ala. 1983) (Jones, J. dissenting).

In *Clardy v. Sanders*, 551 So.2d 1057 (Ala. 1989), the Supreme Court of Alabama denied a stay of the judgment to allow a petition for writ of certiorari to be filed in this Court. Two justices concurred specially to emphasize that:

> Punitive damages in a wrongful death case, such as the case, here, *are different in nature from punitive damages in any other type of tort action in Alabama.* The defendants constitutional arguments concerning this punitive damages award must be considered in a different light than constitutional challenges to puni-

---

[19] This interpretation is consistent with decisions interpreting the Massachusetts statute which until 1973 also allowed damages based solely on the conduct of the defendant. *Loucks v. Standard Oil Co. of New York*, 120 N.E. 198 (Ct. of App. N.Y. 1918) (Cardoza, J.); *Putnam v. Savage*, 244 Mass. 83, 138 N.E. 808 (1923).

> tive damages awards in other tort actions, because in Alabama, *only* punitive damages are recoverable in a wrongful death action.

551 So.2d at 1064. (emphasis supplied.); *See also, Black Belt Wood Co. v. Sessions*, 514 So.2d 1249, 1258 (Ala. 1986) (Maddox, J. concurring specially); *Industrial Chemical and Fiberglass Corp. v. Chandler*, 547 So.2d 812, 829 (Ala. 1988) (Maddox, J. concurring specially).

The Alabama Legislature has also recognized that the damages recoverable under the wrongful death statute are different from classic punitive damages. Recent legislation significantly restricted the availability of punitive damages. *Alabama Code* § 6-11-20 et seq. (Supp. 1990). However, the legislature specifically excluded actions under the Alabama wrongful death statute from the new law. *Alabama Code* § 6-11-29 (Supp. 1990). That distinction is consistent with the wrongful death statute and its attempt "to preserve human life by making homicide expensive." [20]

Many characteristics of the Alabama wrongful death statute confirm that the damages are not "punitive" in the classic sense. A wrongful death action does not abate with the death of the defendant although he can no longer be "punished." *Bagley v. Grime*, 28 Ala. 668, 220 So.2d 876 (1969); *Campbell v. Davis*, 274 Ala. 555, 150 So.2d 187 (1962). Contributory negligence is a defense to a wrongful death action but not to any other claim which would allow imposition of punitive damages. *Lewis v. Sears, Roebuck & Co.*, 512 So.2d 712 (Ala. 1987); *Louisville and N.R. Co. v. Bailey*, 245 Ala. 178, 16 So.2d 167 (1943); *Marbury Lumber Co. v. Jones*, 206 Ala. 669, 91 So. 623 (1921). The damages returned in a wrongful death action are covered by the standard liability insurance policy notwithstanding the typical exclusion from coverage for classic punitive damages. *Employers Ins. Co.*

---

[20] *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 116 (1927).

of Alabama v. Brock, 233 Ala. 551, 172 So. 671 (1937). There is no apportionment of these damages among joint tortfeasors. *Bell v. Riley Bus Lines*, 257 Ala. 120, 57 So.2d 612 (1952).

The amount of any recovery is not includable in taxable income. *Burford v. United States*, 642 F. Supp. 635 (N.D. Ala. 1986). In *Burford*, the court emphasized that although Alabama law "labeled" wrongful death proceeds as "punitive" such damages were allowed for a compensatory rather than punitive purpose. 642 F. Supp. at 637.

The United States Court of Appeals for the Fourth Circuit considered the damages recoverable under the Alabama wrongful death statute in *Denny v. Seaboard Lacquer, Inc.*, 487 F.2d 485 (4th Cir. 1973). The court rejected an attempt by the defendant to equate damages provided by the Alabama statute to exemplary damages in the traditional sense.[21] The court reasoned that:

> Damages under the statute are not punitive in the usual legal sense of that word because Alabama allows their recovery in death cases for less than wanton or malicious conduct, which is the ordinary standard for the imposition of punitive or exemplary damages. Although the use of the word punitive in Alabama jurisprudence, with respect to awards under the death statute, may be unfortunate, we observe that no state is without peculiarities in its law which, while familiar to the native bar, seemed strange to outsiders.

487 F.2d at 489. The court also based its decision on the availability of the defense of contributory negligence and the fact that such damages are awarded without any

---

[21] *See also, Esmond v. Youkers*, 224 A.2d 793 (Pa. 1967) (damages awarded in Alabama wrongful death actions considered "punitive" even though their purpose is compensatory"; *State v. Sanchez*, 579 P.2d 568 (Ariz. 1978) (available damages regarded as "punitive" although survivors afforded recovery.)

compensatory damages to support a punitive award. 487 F.2d at 489.

Alabama Power cites no case where the Alabama wrongful death statute has been held unconstitutional. The only time this Court has considered "punitive" damages which were not imposed *in addition to* full compensation to the victim was in *Yeldell.* The Alabama Supreme Court's decision in this case is consistent with *Yeldell.* It is consistent with the Fifth Circuit decision in *Sullivan.*[22] It is also consistent with more than 100 years of Alabama legal tradition. The petition for writ of certiorari should be denied.

II. THE ISSUE PRESENTED IS NOT OF SUFFICIENT NATIONAL IMPORTANCE TO WARRANT PLENARY REVIEW.

A. Alabama's Wrongful Death Statute Imposes Unique Damages and Subjects Any Verdict to a Unique System of Post Verdict Review.

In order to justify plenary review by this Court a case must present "special and important reasons" deserving review. Supreme Court Rule 10.1(c).

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants . . . . "special and important reasons" imply a reach to a problem beyond the academic or the episodic.

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74 (1955).

---

[22] *United States Cast Iron Pipe and Foundry Co. v. Sullivan,* 3 F.2d 794, *cert. denied,* 268 U.S. 696 (1925).

The Alabama wrongful death statute is unique.[23] Since a recent amendment to the Massachusetts statute,[24] Alabama stands alone in prohibiting compensatory damages and measuring the recovery for wrongful death solely by the culpability of the defendant. Gamble, *Alabama Law of Damages*, § 37-9 (2d ed. 1988); Speiser, *Recovery for Wrongful Death 2d*, § 3.3 (1975).

---

[23] To bolster its weak argument that this case presents an issue justifying plenary review, Alabama Power asserts that other jurisdictions have authorized an award of punitive damages "for what appears to have been simple negligence." Pet. at 6-7. A review of those cases belies Alabama Power's position. In each case the court considered an award of *classic* punitive damages for malicious, wanton, or willful conduct. For example, in *Eichenseer v. Reserve Life Insurance Co.*, 894 F.2d 1414 (5th Cir. 1990), a classic punitive damage award resulted from "gross, callous or wanton conduct" as required under Mississippi law. 894 F.2d at 1417. The dissent, cited by Alabama Power, simply felt that the evidence in that particular case did not meet that legal requirement. Similarly, in *First Interstate Development Corporation v. Ablanedo*, 511 So.2d 536 (Fla. 1987), classic punitive damages were awarded because the defendant had made a deliberate and knowing misrepresentation. Each of the other cases cited by Alabama Power is similarly distinguishable. *Bonsignore v. City of New York*, 521 F.Supp. 394 (S.D. N.Y. 1981) (efforts to deal with police violence so inadequate as to constitute gross or wanton negligence); *Brown v. Maxey*, 369 N.W.2d 677 (Wis. 1985) (availability of punitive damages required proof of "malicious, outrageous or wanton disregard for rights"); *Traveler's Indemnity Co. v. Armstrong*, 442 N.E.2d 349 (Ind. 1988) (award of punitive damages vacated as unsupported by clear and convincing evidence); *Budd Wolf Chevrolet, Inc. v. Robertson*, 508 N.E.2d 567 (Ind. App. 2 Dist. 1987) (instructions given without objection became law of the case although an award of classic punitive damages required purposeful or willful conduct); *Sliman v. Aluminum Co. of America*, 731 P.2d 1267 (Idaho, 1986) (classic punitive damages required wanton, reckless or grossly negligent conduct but dissent disagreed that evidence supported such a finding).

[24] Mass. Gen. Laws Ann. Ch. 299, § 2 (West 1990); *see also*, Zabin, *The New Wrongful Death Act in Massachusetts Steps Into the Twentieth Century*, 58 Mass. L.Q. 345 (1973).

The Alabama wrongful death statute produces a unique type of damages. Although measured by the tortfeasor's culpability, the damages imposed are distributed to the heirs at law, are not included in taxable income, and are covered by liability insurance. Defenses not available to traditional punitive damage claims are available to the defendant in a wrongful death action. Evidence of the wealth of the defendant is excluded from the jury's consideration.

Alabama also imposes a unique system of post-judgment review to assure that the damages assessed in a wrongful death action do not unfairly "punish" the defendant. The defendant is afforded an evidentiary hearing to establish that the award is excessive and is guaranteed continuing economic viability except for the most egregious conduct.

The trial court is required to issue a written decision applying, among other, the following factors:

(1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.

(2) The degree of reprehensibility of the defendant's conduct would be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or "cover-up" of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility.

(3) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.

(4) The financial position of the defendant would be relevant.

(5) All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.

(6) If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.

(7) If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award.

Green Oil Co. v. Hornsby, 539 So.2d 218, 223-224 (Ala. 1989).

This Court recently considered the Alabama system of post-judgment review and held that it "imposes a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages."[25] *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. ——, 111 Sup.Ct. 1032, 1045 (1991). The trial court's application of these factors is subject to *de novo* review on appeal. *Central Alabama Electric Coop. v. Tapley*, 546 So.2d 371 (Ala. 1989). The Supreme Court of Alabama is free to independently review the factual basis for the amount of the award. The Supreme Court also performs a "comparative analysis with other awards allowed in similar cases." *Aetna Life Insurance Co. v. Lavoie*, 505 So.2d 1050, 1053 (Ala. 1987).

The Alabama wrongful death statute is unique. The damages assessed are unique. Alabama affords a unique system of procedural safeguards to assure that any

---

[25] In spite of this Court's conclusion Alabama Power persists in characterizing the Alabama system as granting juries "broad discretion to assess punitive damages in virtually unlimited amounts." Pet. at 27. Clearly that is not the case.

verdict is fair, reasonable and based solely on the culpability of the wrongdoer. This Court should decline plenary review because the case presents no issue applicable anywhere outside the state of Alabama.[26]

B. This Court's Decision in *Pacific Mutual Life Ins. Co. v. Haslip* Provides Sufficient Direction to State Courts on the Issue of Punitive Damages.

Constitutional challenges to punitive damage awards have been presented to this Court on a number of occasions in the last few years.[27] In *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. ——, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), this Court fully considered the contention that punitive damage awards can, in some circumstances, violate the due process clause of the fourteenth amendment. The Court emphasized that punitive damages have long been a part of traditional state tort law and that no state or federal court has considered the common law method for assessing punitive damages to violate the due process clause. This Court recognized that the instructions to the jury[28] gave it significant—but by no means unlimited—discretion in assessing punitive damages. This Court also considered the post judgment review afforded by the *Hammond*[29] test. Since *Pacific Mutual* had received the benefits of "the full

---

[26] *Cf. Curry v. Baker*, 479 U.S. 1301, 1302 (Powell, Circuit Justice 1986) (application for stay denied in case presenting "unique facts closely tied to Alabama election law and rules").

[27] *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Banker's Life and Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986).

[28] The punitive damages instructions considered in *Haslip* were identical to the instructions given the jury in this case. The jury in this case was also instructed that the purpose of the Alabama wrongful death statute is to preserve human life.

[29] *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1983).

panoply of Alabama's procedural protections" [30] this Court rejected its due process challenge.

At the time of the decision in *Haslip*, nine petitions for writ of certiorari raising constitutional challenges to punitive damages awards were pending before this Court. This Court granted certiorari in seven of those cases and remanded them for consideration in light of the *Haslip* decision.[31] The two petitions which sought review of decisions of the Supreme Court of Alabama were denied.[32] This Court has since denied a petition for writ of certiorari challenging the constitutionality of the Alabama wrongful death statute on the identical grounds Alabama Power asserts here. *Burlington Northern v. Whitt*, 59 U.S.L.W. 3672 (April 1, 1991).

Through its decision in *Haslip*, this Court has provided clear instructions to the state courts as to the requirements of due process for assessing punitive damages. The *Haslip* decision will govern awards of classic punitive damage in any case other than one under the Alabama wrongful death statute. Alabama, the only state to impose wrongful death damages based solely on the culpability of the defendant, already provides the substantive and procedural protections endorsed by this

---

[30] *Haslip*, 499 U.S. at 111 S.Ct. at 1046.

[31] *Reserve Life Insurance Company v. Eischenseer*, 894 F.2d 1414 (5th Cir. 1990), —— U.S. ——, 111 S.Ct. 1298, 113 L.Ed. 233 (1991); *Clayton Brokerage v. Gordon*, —— U.S. ——, 111 S.Ct. 1298, 113 L.Ed.2d 233 (1991); *Portec, Inc. v. The Post Office*, —— U.S. ——, 111 S.Ct. 1299, 113 L.Ed.2d 235 (1991); *Hospital Authority of Gwinnett, Georgia v. Jones*, —— U.S. ——, 111 S.Ct. 1298, 113 L.Ed.2d 234 (1991); *Church of Scientology of Californic v. Wollersheim*, —— U.S. ——, 111 S.Ct. 1299 L.Ed.2d 234 (1991); *International Society of Krishna v. George*, —— U.S. ——, 111 S.Ct. 1299, 113 L.Ed.2d 235 (1991).

[32] *General American Life Insurance Company v. Simmons*, —— U.S. ——, 111 S.Ct. 1306, 113 L.Ed.2d 240 (1991); *Massachusetts Mutual Life Insurance Company v. Collins*, —— U.S. ——, 111 S.Ct. 1306, 113 L.Ed.2d 240 (1991).

Court in *Haslip*. There is no need for this Court to consider the issue further.

Alabama Power's petition does not present an issue of sufficient national importance to justify plenary review.

III. THE DECISION BELOW WAS FUNDAMENTALLY FAIR.

Fundamental fairness suggests that Alabama Power have notice that its conduct could subject it to a substantial judgment, that any award not be grossly out of proportion to the severity of the offense, and that there be sufficient procedural protections to insure its interest in rational decisionmaking is reasonably accommodated. These requirements were all met in the decision below.

There can be no dispute that Alabama Power had substantial notice that conduct of its employees which resulted in death could bring a substantial award under the Alabama wrongful death statute. Alabama Power was a party to the initial decision of the Supreme Court of Alabama which determined that "punitive" damages were the only type of damages recoverable in an action for the wrongful death of a child. *Alabama Power Company v. Stogner*, 208 Ala. 666, 95 So. 151 (Ala. 1922). Alabama Power has since been a defendant in actions brought under Alabama's wrongful death statute in at least twenty-two reported decisions.[33] Alabama Power

---

[33] *Ex Parte Newell, Inc.*, 569 So.2d 725 (Ala. 1990); *Alabama Power Co. v. Courtney*, 539 So.2d 170 (Ala. 1989); *Alabama Power Co. v. Capps*, 519 So.2d 1328 (Ala. 1988), *appeal dismissed*, 486 U.S. 1002 (1988); *Alabama Power Co. v. Sessions*, 519 So.2d 1328 (Ala. 1988); *Mattison v. Kirk*, 497 So.2d 120 (Ala. 1986); *Alabama Power Co. v. Cantrell*, 507 So.2d 1295 (Ala. 1986), *appeal dismissed*, 486 U.S. 1028 (1988); *Alabama Power Co. v. Marine Builders, Inc.*, 475 So.2d 54 (Ala. 1984); *Ragsdale v. Altec Industries*, 456 So.2d 54 (Ala. 1984); *Ex parte Tanksley*, 418 So.2d 94 (Ala. 1982); *Murray v. Alabama Power Co.*, 413 So.2d 1109 (Ala. 1982); *Alabama Power Co. v. Robinson*, 404 So.2d 22 (Ala. 1982); *Peevy v. Alabama Power Co.*, 393 So.2d 971 (Ala. 1981); *Merrell v. Alabama*

has unsuccessfully sought a writ of certiorari in this Court in several of those cases.[34] There can be no question Alabama Power was aware of the potential consequences of its negligent conduct which resulted in death.

The jury award was fundamentally fair because it was based solely on Alabama Power's culpable conduct.[35] It simply does not matter whether its conduct is characterized as negligent, grossly negligent, wanton or willful. Due process merely requires that procedural and substantive safeguards be provided to insure that the amount of the judgment is not out of proportion to the gravity of that conduct. What could be more fundamentally fair than to base the amount of damages a defendant must pay on its own conduct? [36]

Alabama Power's conduct in this case was extremely culpable. This is not a case where the jury was dealing with a subtle question of what a reasonable man would

---

Power Co., 382 So.2d 494 (Ala. 1980); *Campbell v. Alabama Power Co.*, 378 So.2d 718 (Ala. 1979); *Alabama Power Co. v. White*, 377 So.2d 930 (Ala. 1979); *Alabama Power Co. v. Scholz*, 283 Ala. 259, 215 So.2d 447 (1968); *Ex Parte Harris*, 277 Ala. 421, 171 So.2d 237 (1965); *Alabama Power Co.*, 273 Ala. 509, 142 So.2d 228 (1962); *Alabama Power Co. v. Kirkpatrick*, 268 Ala. 338, 105 So.2d 855 (1957); *Mosley v. Alabama Power Co.*, 246 Ala. 416, 21 So.2d 305 (1945); *Sullivan v. Alabama Power Co.*, 246 Ala. 262, 20 So.2d 224 (1945); *Alabama Power Co. v. Talmadge*, 207 Ala. 86, 93 So. 578, *writ of error dismissed*, 259 U.S. 575 (1922).

[34] *Alabama Power Co. v. Talmadge*, 207 Ala. 86, 93 So. 578, *writ of error dismissed*, 259 U.S. 575 (1922); *Alabama Power Co. v. Capps*, 519 So.2d 1328 (Ala. 1988), *appeal dismissed*, 486 U.S. 1002 (1988); *Alabama Power Co. v. Cantrell*, 507 So.2d 1295 (Ala. 1986), *appeal dismissed*, 486 U.S. 1028 (1988).

[35] This Court should not grant plenary review to consider the particular facts on which this verdict was based. *United States v. Johnston*, 268 U.S. 220 (1925).

[36] Indeed, Alabama Power admits that due process requires only that any "punishment" be "commensurate with the degree of culpability." Pet. at 24.

do under the circumstances. Rather, Alabama Power admitted that the condition of its equipment grossly violated all applicable safety standards and created an extremely dangerous condition likely to cause death or serious injury. Pet. at 28a. The dangerous condition had existed at this location for fifteen months although Alabama Power employees had numerous opportunities to notice and correct the danger.

The wrongful death resulted from company policy as well as the failure of particular employees. Alabama Power has no system to identify potentially dangerous locations such as this one where guy wires run between energized conductors. Nor does Alabama Power have any routine inspection program for its wires and equipment. The trial court correctly found this conduct highly culpable. Pet. at 29a.

The unique safeguards adopted by Alabama to insure that the jury award was not out of proportion to the conduct of Alabama Power have been discussed at length earlier in this brief. This Court has endorsed those procedures and characterized them as imposing "a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages." [37] Those procedural protections resulted in a reduction in the jury award against Alabama Power of $1,500,000.[38] Alabama Power, just as *Pacific Mutual*, has received the benefits of "the full panoply of Alabama's procedural protections." [39]

---

[37] *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. ——, ——, 111 Sup.Ct. 1032, 1045 (1991).

[38] The protections afforded by *Hammond* and *Green Oil* are much less needed in this case since Alabama Power was required to pay no compensatory damages and the damages assessed against it were not "in addition to" full and complete compensation to the victim.

[39] *Id.* 111 Sup.Ct. at 1046.

Alabama Power had notice that its conduct could lead to a substantial judgment, the award is not grossly out of proportion to the severity of the offense and Alabama Power was afforded "the full panoply of Alabama procedural protections." The petition for writ of certiorari should be denied.

IV. THIS COURT SHOULD NOT, AS A MATTER OF FEDERAL CONSTITUTIONAL LAW, LEGISLATE TO A STATE THE SYSTEM IT MUST USE TO ASSESS DAMAGES IN WRONGFUL DEATH ACTIONS.

Alabama Power asks this Court to engage in unprecedented judicial activism. It asks this Court, through judicial policy making, to dictate to Alabama the scheme it must use for recovery for wrongful death. That decision is a policy question the states should remain free to resolve.

Recovery for wrongful death is statutory in each of the fifty states. The provisions of these statutes vary widely as to the persons for whom such an action may be maintained, the measure and elements of recoverable damages and the distribution of any proceeds. Speiser, *Recovery for Wrongful Death 2d.* § 1:9 (1975). Some statutes provide a cause of action for a "wrongful act or omission," [40] others for "wrongful act, carelessness, negligence or default," [41] others for "wrongful or negligent injury or death," [42] and still others for "wrongful act or neglect".[43]

Some states measure the damages recoverable by the loss to the surviving beneficiaries including support and

---

[40] *Ind. Code* § 34-1-1-2 (1975); *Minn. Stat.* § 573.02 (1982).

[41] *Fla. Stat.* § 768.19 (1984).

[42] *Iowa Code* § 613.15 (1970).

[43] *Mont. Code Ann.* § 93-2810 (1990); *Idaho Code* § 5-311 (1982); *Kan. Stat. Ann.* § 60-1904 (1989).

maintenance, loss of services and loss of companionship.[44] Some states allow recovery for mental anguish and grief of the survivors while others do not. Some states also allow the recovery of administration expenses and attorney's fees.[45]

Although Alabama is currently the only state which prohibits compensatory damages and allows only damages based solely on the conduct of the wrongdoer, until 1974 Massachusetts had a similar statute. Some statutes expressly provide for punitive damages,[46] some statutes are not specific as to punitive damages,[47] and other states have prohibited punitive damages.[48]

Several courts have considered constitutional challenges to wrongful death statutes which prohibit punitive damages. The United States District Court for the Central District of California struck down that state's law prohibiting punitive damages in wrongful death actions as violating the equal protection clause of the fourteenth amendment. *In Re Paris Air Crash*, 427 F.Supp. 701 (C.D. Cal. 1977). The United States Court of Appeals for the 9th circuit reversed in an opinion written by then Circuit Judge Anthony Kennedy. *In Re Paris Air Crash*, 622 F.2d 1315 (9th Cir. 1980). The court refused to apply a strict scrutiny standard and held that there was a rational relation between the statute and its legislative object.[49]

---

[44] *Rivers v. Kairis*, 442 N.E.2d 494 (Ohio 1982).

[45] *Ill. Rev. Stat.* ch. 10 § 2 (1979); *Thomas v. Eads*, 400 N.E.2d 778 (Ind.App. 1980).

[46] *Beck v. Carolina Power & Light Co.*, 291 S.E.2d 897 (N.C. App.), *aff'd*, 297 S.E.2d 397 (1982).

[47] *Gavica v. Hanson*, 608 P.2d 861 (Idaho 1980); *Berenger v. Frink*, 314 N.W.2d 388 (Iowa 1982); *Behrens v. Raleigh Hills Hospital, Inc.*, 675 P.2d 1179 (Utah 1983).

[48] *Truelove v. Wilson*, 285 S.E.2d 556 (Ga.App. 1981); *Skell v. Grown*; *Rubeck v. Huffman*, 374 N.E.2d 411 (Ohio 1978); *Eisert v. Greenberg Roofing & Sheet Metal Co.*, 314 N.W.2d 226 (Minn. 1982).

[49] *See also, Re Air Crash Disaster Near Chicago*, 507 F.Supp. 21 (N.D. Ill. 1980), *aff'd*, 644 F.2d 633 (7th Cir. 1981). *Platomic Elec-*

As the court recognized *In Re Paris Air Crash*, it is well within the police power of a state to determine the damages available under its wrongful death statute. This Court has traditionally deferred to the states in the area of the exercise of their police powers:

> But neither the Amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the states, sometime termed its "police power," to prescribe regulations to promote the health, peace, morals, education, and good order of the people and to legislate so as to increase the industries of the state; develop its resources and add to its wealth and prosperity.

Barbier v. Conolly, 113 U.S. 27, 29 (1885). This court should continue that tradition and decline to legislate for the states a system for recovery for wrongful deaths. The petition for writ of certiorari should be denied.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JERE L. BEASLEY
FRANK M. WILSON *
BEASLEY, WILSON, ALLEN, MENDELSOHN, JEMISON & JAMES, P.C.
207 Montgomery Street
P.O. Box 4160
Montgomery, Alabama 36103-4160
(205) 269-2343
Attorneys for Respondent

* Counsel of Record

May 10, 1991

---

tric Power Co. v. Smith, 558 A.2d 768 (Md. App. 1989), *cert. denied*, 564 A.2d 407 (Md. 1989).